

Section by Section Summary of the Supplemental Mine Improvement and New Emergency Response Act of 2007 (S-MINER Act)

Section 1 - Short Title. - This Act may be officially referred to by either its full title or its acronym. A table of contents is provided.

Section 2 - Sense of Congress - This section briefly explains why Congress has elected to address mining health and safety again only one year after it legislated on this topic.

Section 3 - Definitions; References - This section generally provides that key terms and references in this statute refer to provisions of the Mine Safety and Health Act of 1977.

Section 4 - Supplementing Emergency Response Plans.

The provisions of this section would enhance specific actions taken in the MINER Act to address the causes of these tragedies. The MINER Act was based on what was known by mid-2006. However, a year later, the record is clear on two points: first, that these tragedies could occur again today; and second, that there are additional actions which it is now feasible for mine operators to take that can prevent such tragedies.

(a) Post Accident Communications - Prior to 2006, communications between the surface and underground coal mines often consisted of only a single unprotected phone line that could be easily severed during a fire or explosion. Miners have died as a result. Among the most important purposes of the MINER Act was to bring the technology available for miners underground to communicate with the surface into the 21st century. The bill clarifies and updates those requirements based on significant developments since the MINER Act was passed.

The first step required under the MINER Act was for operators of underground coal mines to install a second telephone line in a different passageway -- to provide some redundancy should the primary system be interrupted. This requirement is now being implemented on a mine by mine basis.

The second step required under the MINER Act is for mine operators to install more advanced communication systems by June 15, 2009 -- systems that can survive accidents like those in 2006 and function in a post-accident environment. The MINER Act specifically referred to “wireless two-way” communication systems as a goal, although it provided for a backup should such technology not be available.

At the time the MINER Act was passed, the roadmap ahead was unclear. Since that time, however, NIOSH has developed just such a roadmap. The roadmap contemplates that by 2009, mine communication systems will be able to survive accidents like those which happened. Those systems can be based on “backbones” available today (the so-called “leaky feeder” system). This consists of a co-axial cable, similar to one delivering a TV signal to a home, but from which some of the signal can “leak” to nearby reception

devices. Some of the components of this system are still being adjusted to provide more cost-effective and efficient performance. However, it turns out that installing just the leaky feeder backbone now will immediately provide miners much better protection than the redundant phone line which the MINER Act currently requires, and is not expensive.

Because getting improved communications systems in place is so critical to miner safety, the bill would require mine operators to amend their emergency response plans within 4 months of enactment of the new legislation to provide for such leaky feeder technology. The systems are to be hardened to the extent possible (i.e., buried in a mine floor), to help ensure their survivability. As NIOSH certifies new components are available to enhance system performance, they are to be promptly added.

While the bill would not ban the use of this system for non-emergency purposes, it would discourage inappropriate use of the system to electronically track employee job performance.

(b) Underground Refuges - The recent reports on the Sago and Darby accidents in 2006 emphasizes the critical life-saving role underground refuges could have played in saving most of the lives lost in these accidents. Consistent with the requirements of law, miners had nothing more than wood boards and cloth with which to try and protect themselves from toxic fumes after an accident. Since there was a lack of consensus at the time on what improved protection to recommend, the MINER Act required NIOSH to conduct a study of refuge alternatives in underground coal mines. The Act required this study to be completed by December 15, 2007, and for a report to the Congress within 6 months thereafter.

This bill would accelerate the installation of refuge chambers near the mining face based on the significant progress that has been made in their design and availability since the MINER Act was passed. While various underground tests of these new designs continue, NIOSH has repeatedly stated that it is not planning not going to recommend any significant changes in the requirements for such refuges in such locations in the State where they are now required. Accordingly, given the significant safety protection offered by such refuges, further delay in installing them in all underground coal mines is unjustified.

Specifically, the bill would require that by December 15, 2007, a mine's emergency response plans required under the MINER Act is to provide for underground refuges within one thousand (1,000) feet of the nearest working face in each working section, meeting such criteria as the Secretary of Labor certifies are as protective as the requirements in any state which already requires such refuges. The bill ensures that any state which already has such requirements in place would not have to take further action at this time.

While this new requirement will greatly speed up bringing these life-saving refuges to underground coal mines, it does not completely fulfill the mandate of the MINER Act. The NIOSH study may lead to further improvements in the existing technology, more

complete assessment of their capabilities, and recommendations for refuges for miners who are more distant from the coal face. Accordingly, the amendment further requires that by June 15, 2008, the Secretary issue final regulations for the installation of rescue chambers in the working areas of underground mines that are consistent with design criteria recommended by NIOSH and the report already required under the MINER Act.

(c) Seals, Ventilation Controls, and Rock Dusting.— This subsection increases the strength of various wall-like structures in underground coal mines to enable them to resist explosions, and also requires the explosive risks of coal dust to be studied and appropriate action taken in light of the results.

Paragraph (c)(1) would establish new requirements to ensure the integrity of seals. “Seals” are structures used to segregate abandoned areas of the mine from working areas, and need to be able to contain an explosion should one occur in the abandoned area. The tragedies in 2006 clearly revealed that the “seals” used to separate abandoned areas of the mine from working areas did not meet the “explosion proof” standard in the Coal Act of 1969. The MINER Act took firm action to ensure that the seals were improved, by requiring MSHA to issue a final rule no later than December 15, 2007 to update the current 20psi standard.

The bill would amend the MINER Act to ensure that the requirements that must be established by MSHA in December of this year are consistent with the final recommendations on the design, construction, maintenance and monitoring of new and existing seals issued this year by NIOSH. The bill goes beyond the NIOSH recommendations in one particular, however, in that it further requires that all new seals are to be monitored without regard for how strongly they are constructed, and specifies how this is to be done.

In addition, the bill would require that the standards issued by MSHA provide that all new seals are to be inspected at some point during their construction by the agency. While MSHA must approve the plans for such construction, inspection is necessary to ensure each is being constructed in accordance with their approved design plans. It is our understanding that this is consistent with existing MSHA policy. The bill does not preclude supplemental examinations by qualified personnel on behalf of the mine operator.

Paragraph (c)(2) would establish new requirements to ensure the integrity of ventilation controls. “Ventilation controls” refer to structures that segregate ventilation channels to preserve the flow of air. For example, the term “stoppings” is often used to describe structures that separate passageways in the working areas of the mine, to channel ventilation to and from the areas where miners are working. Stoppings must be able to resist overpressures caused by explosions. If stoppings fail, miners and rescue workers do not have the air they need until “curtains” are hung to replace them (as at Sago), and smoke can spread into rescue passageways (as at Aracoma). To this end, the bill would require that no later than one year after enactment, the Secretary issue interim final

regulations requiring that these structures be built using traditional concrete block construction technology.

Paragraph (c)(3) would create a study to determine whether today's rock dusting practices, which have been in place for more than 30 years, adequately address the explosion risks presented by coal dust in the mine atmosphere. "Rock dusting" is an essential tool in limiting in-mine explosions. Coal dust can propagate an explosion generated by an ignition, and not infrequently generates secondary explosions if it has not been properly limited. Coal dust is made less explosive by removing it from areas near ignition sources (e.g., conveyor belts), and by treating it with rock dust.

Section 304(d) of the Mine Act of 1977 sets forth the current statutory formula for how much rock dust must be added to coal dust. The coal dust generated by the longwall equipment used in many coal mines today is believed to be finer than what was generated in the past, and hence likely to be more explosive. If so, this means that miners today may be at increased risk if the rock dusting is limited to the traditional amounts.

The bill would require NIOSH to conduct a study of the matter and issue recommendations by June 15, 2008, and require the Secretary of Labor to take appropriate action in light thereof, including the issuance of an emergency temporary standard should the study indicate that the risks to miners are significant enough to justify such action.

(d) Conveyor Belt Risks.— The Aracoma Alma fire raised renewed concerns about the role conveyor belts could play in igniting underground fires. These belts create friction through their constant movement, which can ignite the coal dust which accumulates along the belts. The current standards for belt flame resistance are 52 years old, and were to be updated to meet NIOSH recommendations when the rulemaking was halted. A practice known as "belt air" can make matters worse because it uses the passageway normally reserved for the conveyor belt as an intake air channel; so should fire begin, the fire is carried toward where miners are working. The MINER Act established a Technical Study Panel to, among other things, conduct engineering reviews and make recommendations with respect to belt air and on the composition and fire retardant properties of conveyor belt materials in underground coal mining.

Based on the findings of the Aracoma Alma investigations not available at the time of the MINER Act, the need for urgently addressing these problems has become more clear. Accordingly, rather than await the results of the Technical Study Panel to initiate action, the bill would require earlier action by MSHA.

Paragraph (d)(1) would require MSHA to issue an interim final regulations by December 31, 2007 to upgrade existing conveyor belts as soon as practicable to those with the flammability resistance meeting with the NIOSH standards. Subsequently, in finalizing this interim rule, the Secretary would have the benefit of the record and recommendations of the Technical Study Panel. The bill recognizes that some mines maintain inventories

of existing belts, but prohibits the installation after December 31, 2008 of any belt that doesn't meet the new standard.

Paragraph (d)(2) would permanently eliminate the practice of using "belt air" to ventilate the Nation's underground coal mines. The law banned the practice years ago, but that ban has steadily eroded. Mine operators with existing developments utilizing this practice would be able to continue doing so for a limited period of time to avoid production shutdowns and job losses, but thereafter the practice would be completely banned. The bill would prohibit the use of the modification authority in the Act to alter this requirement on a case by case basis, as had become a too-common practice over the years.

(e) Pre-Shift Review of Mine Conditions.— Pre-shift examinations are a critical element in ensuring the safety of underground coal mines, and are required by section 303(d) of the Mine Act of 1977. The information collected during these important examinations, however, serves no protective purpose if the information is not promptly conveyed to the workers about to enter the mine. The law currently provides only that: "Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designation station on the surface of each mine, before other persons enter the underground areas of such mine to work in such shift." Accordingly, the bill would add a requirement to the law to require oral communications between those inspecting a mine prior to a work shift and those beginning the next shift.

(f) Atmospheric Monitoring Systems.— As evidenced by the tragedies in 2006, fire and excess methane are extremely dangerous underground conditions. While most homeowners today are required by local codes to have detectors in their homes to detect smoke and toxic fumes, and while such devices have been well tested in mines, they are not required except in those cases when the mine operator is using belt air. This poses an unjustified risk to the miners. It also means that rescuers do not have the information they need to assess underground conditions once an incident occurs, potentially halting rescue until more crude measurements at the mine mouth reveal it is safe to proceed -- as was, for example, the case at Sago. Accordingly, the bill requires that not later than May 1, 2008, an operator of an underground mine must install atmospheric detection and warning systems, in all underground areas where miners normally work and travel, that provide real-time information regarding methane levels, carbon monoxide levels, oxygen levels, air flow, and temperature and that can, to the maximum extent possible, withstand explosions and fires.

(g) Methane Monitors.— Miners die if they do not know that they are exposed to hazardous gases that cannot be detected through their regular senses. It is possible that the explosion at the Darby mine took place because a miner was unaware that the area in which he was using a torch was saturated with methane gas due to a leak in a nearby seal. Similarly, many miners involved in the tragedies during 2006 were uncertain whether they needed to don and keep on their self-rescuers to avoid poisoning by carbon

monoxide gas. A similar risk can occur in areas of the mine in which oxygen levels are too low.

Although not mandated to do so by the MINER Act, MSHA has already taken some steps to address this problem. Specifically, MSHA's emergency response rule of December 8, 2006, provided that mine operators "provide an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen, and carbon monoxide to each group of underground miners, and (also) to each person who works alone, such as pumpers, examiners and outby miners." (30 CFR 75.1714-7) However, this protection is in practice not complete. For example, if a group of miners gets one meter, and one or more of the miners has to split away from the group (as is often the case) to perform work in nearby areas that may have very different atmospheric conditions, a terrible choice has to be made as to which miner(s) has the meter. Accordingly, the bill would expand upon MSHA's regulatory action to ensure that, as a matter of law, such multi-gas detectors are supplied to "each miner who may be working alone for part of a shift."

(h) Lightning. - Various reasons have been advanced on the ignition source which set off the spark that ultimately led to the horrible tragedy at the Sago mine. MSHA's accident report, based on studies by Sandia laboratories, asserts that a lightning pulse above the location of the underground mine created an electrical charge in a cable in an abandoned area of the mine, and this charge was enough to set off the explosive concentration of methane present in that area. There have been many documented examples of lightning touching off an underground mine explosion by, for example, striking a metal conduit pipe extended to the surface; and for this reason, mines are required to install lightning arrestors. If lightning can set off underground explosions in the manner suggested by MSHA's accident report, however, then the existing protections are inadequate. While removing cabling in sealed areas and more carefully enforcing requirements that metal connections between abandoned and working areas be severed, more may need to be done to ensure that miners who are working underground during lightning storms are either protected or withdrawn.

The bill takes two actions to deal with this problem.

First, the bill amends the law to specifically provide that if mine operators cannot fully protect miners from the effects of lightning through grounding and other engineering controls, they are to use administrative controls to protect their miners -- i.e., to withdraw them from the mine. This provision makes it a significant and substantial violation to fail to take such action, and protects miners from loss of pay should they need to be withdrawn to protect their safety.

Second, the bill provides that no later than one year after the date of enactment of this title, the National Academy of Science shall issue recommendations to the Secretary of Labor, with a copy to the Congress, on actions that need to be taken to strengthen existing requirements in the law or regulations to ensure that miners are protected from potential damage that could be generated because of lightning strikes near a mine to the fullest

extent permitted by adopting any existing technology to the mining environment, and on research needed for improved technology.

(i) SCSR Inspection Program. - Initial reports on the tragedies in 2006 raised a number of questions about the reliability of the SCSRs maintained by some miner operators. As with other aspects of the law, it is the obligation of mine operators to ensure that their SCSRs are properly maintained -- see, generally, 30 CFR 7514-3. MSHA's emergency evacuation rule of December 8, 2006, added additional requirements in this regard; specifically, that mine operators regularly inventory their SCSR supplies, file those lists with MSHA, and notify the agency promptly of any defect, malfunction or performance problem with any unit in its inventory. 30 CFR 75.7514-8

However, as important as it is to make mine operators responsible for such actions, the government also has a responsibility for ensuring these devices are, in fact, operative. At the present time, NIOSH conducts a random survey of all SCSR units in service in mines. While that agency has taken steps this year to address identified deficiencies in its program, NIOSH has no power to actually select and remove specific SCSRs from service for testing. Rather, it depends upon operator voluntary compliance, and it is therefore likely that some operators will decline to submit units for testing that may demonstrate that they are not in compliance with the law's requirements. MSHA has the authority to make such requests, and ensure that the units selected for testing are indeed the units it wants, but has declined to do so. The bill would correct this situation and mandate that MSHA make the requests for the units that require testing. It is anticipated that once the units are obtained, MSHA will have NIOSH perform the actual testing. Of course to meet other requirements of the MINER Act, mine operators will need to replace the units being tested so that there are an adequate number available to provide for safe exit in an emergency, and the bill clarifies their obligation in this regard.

(j) Application To Underground Metal And Nonmetal Mines. - The MINER Act was an explicit response to the tragedies of 2006 and other identified problems in underground coal mines. Nevertheless, it remains a fact that the worst underground tragedy in a US mine was at a non-coal mine. While regulations governing operations at these mines so have some safeguards to protect miners during an emergency, either by escape or refuge, these provisions have not received attention in many years. Accordingly, the bill would require the Secretary to establish an advisory committee to look into the problem, and would set a deadline for the advisory committee to make recommendations to the Secretary and the Congress in this regard. Such recommendations are to include any action by the Congress that could facilitate the goal of providing underground metal and nonmetal miners with the same level of protection as underground coal miners.

(k) Approval Center Priorities. - In order for certain devices to be used underground, they must be approved by MSHA as "intrinsically safe" -- i.e., their components are designed so as not to create a risk of igniting explosive gases present in the mine atmosphere. There is a considerable backlog at MSHA's approval center, which needs to be addressed with increased resources. This bill would simply reinforce that, consistent with existing policy, priority is given to the approval of any self-rescue device that

permits the replenishment of oxygen without requiring the device user to remove the device, and to the approval of any communications device that would permit mine operators to comply with the requirements of the MINER Act for the installation of an underground communication device that provides for communication between underground and surface personnel via a wireless two-way medium.

(l) Technology And Mine Emergency Health And Safety Research Priorities. - The bill provides that in implementing its research activities in the 5-year period beginning on the date of enactment of this Act, the National Institute for Occupational Safety and Health give due consideration to new technologies, and existing technologies that could be adapted for use in underground coal or other mines, that could facilitate the survival of miners in a mining emergency. The bill specifies some examples of the technologies to be given this priority attention.

SEC. 5. SUPPLEMENTING ENFORCEMENT AUTHORITY.

(a) Authority of inspectors. – This subsection would clarify current law to ensure that MSHA inspectors can respond properly in the event of an accident.

Paragraph (1) would amend section 103 of the Act to explicitly prevent interference with inspectors during the course of their activities. It would thus ensure that operators cannot stall inspectors by putting limits on their ability to take photographs or samples, refuse to provide transportation into a mine, or interfere in the investigation of an accident or other incident, or during accident or recovery. This amendment would be consistent with existing interpretations of the law, but making this prohibition explicit would facilitate compliance.

Paragraph (2) would amend section 103(k) of Mine Act which permits an MSHA inspector to issue an order to shut a mine in the event of an accident. The purpose of such orders is to protect others who might be tempted to remain underground or go back underground to rescue missing miners. The amendment eliminates any question about the need for MSHA to actually be present on mine property to issue such an order. This change is consistent with the action taken by the MINER Act to speed up notification of MSHA in the event of an accident. This paragraph of the bill further provides that in the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action the Secretary deems appropriate to protect the life of any person, and may supervise and direct the rescue and recovery activities in such mine.

(b) Transition to a new generation of inspectors. - The lack of an adequate number of inspectors to perform the required number of regular inspections of underground coal mines has proved to be a persistent problem. It has required MSHA to divert staff from other critical duties. Moreover, these inspections may not be as thorough as when performed by those who have and keep current the required expertise. While MSHA has considerably expanded its hiring efforts since the MINER Act was passed, it is barely

able to keep up with the retirement rate, let alone add new inspectors, and training new inspectors takes 18 months even with compressed classroom time.

Accordingly, subsection (b) takes several steps to slow the loss of senior experienced personnel while the agency is building up its supply of new inspectors. The bill would require MSHA to establish a Master Inspection program, to lift personnel ceilings for five years so that new and existing personnel could work together for these periods if resources to do so are adequate, and permit retired inspectors to perform such services for MSHA under contract for five years without loss of retirement pay. Annual reports to the Congress would be required during the five-years that these special waivers are in effect to ensure that they are being properly managed.

(c) Office Of Miner Ombudsman. - The bill would establish a new position within the office of the Inspector General of the Department of Labor to protect miner rights, and particularly to ensure the integrity of the complaint process. The Ombudsman would receive all complaints of operator violations that come to the Department, and ensure the confidentiality of those making these reports. The Ombudsman would use this information to ensure the complaints are being timely and properly addressed, and would be given specific authority to this end, and would also enjoy whatever general authorities are already available to the office of the Inspector General. The Ombudsman would also monitor the agency's compliance with the anti-retaliatory requirements of the Miner Act.

The Ombudsman position would be filled by a Presidential appointee with expertise in mine safety and health, who would be authorized to hire necessary staff in accordance with money appropriated by the Congress.

(d) Pattern Of Violations.— The Mine Act of 1977 provided MSHA with the authority to cite mine operators for a pattern of violations and impose significant penalties in connection therewith. While MSHA has threatened to use this authority on several occasions, it has never actually issued such a citation. The Agency has recently indicated its intention to establish objective criteria to identify mines which may have a pattern of violations; such criteria may help it defend decisions to issue citations under this provision should it ever do so.

The bill would make it easier for MSHA to use this authority by consolidating the chain of command required in the existing regulations to take such action. It would also help to ensure that appropriate factors, in particular a violation frequency rate, are used to determine whether to issue such a significant citation, to alleviate concerns that such a tool might inappropriately target frequently inspected mine operations.

A significant new penalty would also be authorized when a pattern of violations is found, and miners would have to be withdrawn from the entire mine. However, the bill specifically provides that the amount actually assessed is to be designed to ensure a change in the future conduct of the operators and corporate owners of such mine with respect to mine safety and health, given the overall resources of such operators. In addition, the bill provides an additional way for mine operators to get out of a pattern of

violations chain when they can provide objective evidence of a change in their pattern of conduct.

(e) Notification of Abatement. - Mining tragedies often result from the failure of a mine operator to correct conditions that are known to be MSHA violations. This includes violations that have actually been identified and cited by MSHA, but not corrected as required. Under the present system, MSHA may not be aware that a violation it cites has not been timely abated, nor is it able to act until it visits the mine again and confirms that there has been a “failure to abate.”

The bill would change this situation. It would require mine operators to affirmatively notify MSHA within the time specified in the citation that the violations previously identified and cited by MSHA have been timely abated. The amendment would further require that if this notice is not timely provided, MSHA is to issue a withdrawal order to prohibit miners from entering the affected area until MSHA can visit the mine to determine the situation for itself. If mine operators need more time to abate violations, there are procedures for obtaining that extra time where it is justified; but the bill will help ensure that once these dates are fixed, mine operators will take them seriously.

(f) Failure to Timely Pay Penalty Assessments.— Last year, the Congress reviewed reports concerning the difficulties MSHA faces when it tries to obtain payment of fines (which are the subject of final orders under the Act) from some scofflaw mine operators. The amounts involved tend to be too small for Treasury Department to expend resources collecting. Moreover, the mine operator cited may not in fact be the responsible financial entity. MSHA indicated an intent to seek relief by trying a new tool -- court orders under section 108 of the Mine Act to require scofflaw operators to post bonds to cover potential violations as a condition of continued operation. Section 9 of the MINER Act added a change to section 108 of the Act to facilitate such efforts, and we understand MSHA has since had some success.

The bill would make it easier to address this problem by simply authorizing the Secretary to halt production at a mine that does not pay in full any outstanding obligations. See also section 203 of the bill with respect to amendments that would address problems associated with the identification of financially responsible parties.

(g) Maximum and Minimum Penalties. - While penalty caps established by the Mine Act of 1977 have been increased over the years as a result of the Inflation Adjustment Act, they have not been high enough to provide a serious incentive for compliance when mining profits are high, and many mine operators just regard these penalties as “traffic tickets” that are to be paid as a routine cost of doing business.

The MINER Act responded to this problem by substantially increasing the maximum penalties for certain types of violations -- willful violations of standards, or knowingly failing or refusing to comply with an abatement, withdrawal or other such order issued by MSHA. The MINER Act also added a new category of flagrant violations with penalties of up to \$220,000, and established minimum penalties for imminent danger violations

(\$2000 for the occurrence, and \$4000 for a failure to comply with an associated withdrawal order.

The bill would supplement the approach taken by the MINER Act and apply it to other types of violations. The law currently provides a cap of \$50,000 on penalties for violations of provisions of the Act or a standard and has no minimum. The bill would raise the cap to \$100,000 and establish a minimum penalty of \$500. However, should a violation ultimately be determined to be a “significant and substantial” violation (i.e., it could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard), the cap would be \$150,000 and the minimum would be \$100.

(h) Factors in Assessing Penalties. - Over the last year, the National Mining Association has stated on more than one occasion that if a mine operator is not prepared to look after the safety and health of the miners, that operator should not be allowed to continue in business. This widely endorsed view, however, is contradicted by a provision of the existing law that in assessing penalties against a mine operator for violations, the “effect upon the operator’s ability to continue in business” needs to be considered. The bill would strike this requirement of the law.

The bill would not alter the requirement of the existing law that operator size be taken into account in assessing penalties. However, the bill would clarify the current law to provide that in such considerations, the Secretary look at the combined size of the operator and any controlling entity. The purpose of this change is to ensure that very large and profitable corporations do not have their penalties reduced simply because they conduct their mining operations through limited size production units each of which is registered as a “mine operator” under the Act.

Finally, the bill would take account of an anomaly pointed out by the Government Accountability Office in a report released May 16, 2007. For some years, MSHA has utilized a complex point system to ensure that in recommending penalty assessments, decisions are made in a consistent manner. In fact, the agency updated that system this year to ensure, among other things, that proposed assessments give more weight to the gravity of the violation involved. According to the GAO, however, similar practices are not observed in the process of settling cases. Further, the Mine Safety and Health Review Commission, which is ultimately responsible for final penalty assessments under the Act, does not utilize this practice, and the judges who work for the commission often provide very little information about the basis upon which the final assessments are determined. To ensure consistency in penalty practices, and to ensure appropriate weight is being given to the gravity of violations, the bill requires the point system used by the Secretary shall also be used in settlements and in determinations by the Commission.

(i) Civil Penalty for Interference or Discrimination.— The bill would increase the penalties for those who retaliate against miners who report safety and health violations. Such violations are particularly onerous, because they discourage miners from reporting problems which could result in a tragedy. Testimony by miners and survivors and their

representatives pointed out that such discouragement is widespread in mining communities which are dependent upon the industry for good jobs. The bill take a first step toward addressing these problems by establishing a minimum penalty of \$10,000 and a maximum of \$100,000 for such violations.

The bill would also provide that the same minimum and maximum penalties be applied to violations of the new requirements established by section 5(a) of the bill which prohibit interference with mine inspectors in the performance of their duties.

(j) Imminent Danger. - The purpose of the emergency response plans established pursuant to the MINER Act was to strengthen the ability of all concerned to limit the causes of mine disasters and to improve the survival chances of miners should they occur. The same is true of the requirements that this bill would add to those plans. Accordingly, the failure of a mine operator to fulfill any of the relevant requirements constitutes an imminent danger to miners, and the bill would amend the Act to make this explicit.

(k) Clarifications Of Intent In The 1977 Act. -- As with any statute that is 30 years old, the Mine Safety and Health Act has a few well recognized technical deficiencies. This subsection of the bill would remedy these long-standing problems.

(k)(1) would amend the definition of “operator” in section 3 of the Mine Act. The primary focus of the amendment is to deal with a problem involving independent contractors who actually perform production operations for other entities at a particular mine. Mining companies often contract with separate business entities to conduct mine operations at specific locations, and sometimes these entities are formed just for the exclusive purpose of that contract. The amendment would ensure that should such an independent contractor go out of business without payment of penalties, or if such contractor fails to comply with the law, the contracting party may be held jointly or severably liable for the violations of the Act committed by the contractor, including the responsibility for the payment of fines under the Act. Since this section is being amended, the bill also makes a few small changes to codify long-standing interpretations of the Act.

(k)(2) would amend section 103(b) of the Mine Safety and Health Act to provide the Secretary with broad subpoena authority, equivalent to that under the Occupational Safety and Health Act and many other government programs. Currently, subpoena authority is only available in connection with public hearings held in the course of accident investigations. Broader subpoena power is necessary for the Secretary to conduct a broad range of activities, for example:

- * to determine which business entities may be mine operators or controllers of a mine for enforcement purposes (both penalty size and who has to pay); currently this is based largely on self-reporting
- * to obtain testimony or records from 3rd parties (e.g., foremen, miners, contractors, other witnesses) against whom no injunction can be obtained under section 108 concerning whistleblowing, accident investigations or other matters; and

* to obtain testimony or records from operators without the need to seek injunctive relief under section 108.

The amendment would also clarify that data and items of physical evidence are among the types of “information” that can be subpoenaed. The bill would make a conforming amendment to section 103(h) of the Mine Act to ensure that operators are required to provide the types of “information” that may be requested by subpoena.

(k)(3) would amend section 104 of the Mine Act to clarify that a violation of a specific provision of the Act can, just a violation of a standard issued pursuant to the Act, be deemed a “significant and substantial” violation. This determination is required before a violation can become the basis for the more serious sanctions available under these sections. There are many critical provisions protecting miner health and safety that are specified directly in the Act -- for example, the interference with inspections and advance notice, and by orders, which may represent significant and substantial violations of the Mine Act. These should be among those violations which can form the basis of the enhanced enforcement under section 104(d) and 104(e) of the Mine Act. The prior language has led to a narrower use of significant and substantial violations than is appropriate for the protection of miners(e.g., Cypress Emerald Resources v. FMSHRC, 195 F.3d 42 (1999)), and clarifying the Mine Act in this regard would eliminate continued litigation disputes.

The bill would further amend section 104 to eliminate some verbiage which is generally considered to have been a drafting error in the 1977 Act. The language seems to suggest to some that a 104(d)(1) sanction cannot be imposed when there is an imminent danger. This would mean that the most grave hazards constituting imminent dangers could not lead to the commencement of enhanced enforcement under section 104(d) and 104(E). This was never intended to be the case. Eliminating these words would ensure others do not misread this provision.

(k)(4) would eliminate some verbiage from section 105(a) that has recently been the basis of inappropriate challenges by some mine operators to MSHA penalties. It was never the intent of the Mine Act to void citations or penalties if MSHA requires additional time to issue them. Eliminating a reference to “reasonable time” will ensure others do not misread this provision of the Act.

This section would address two issues involving attorneys by adding two sentences. The first sentence would clarify that MSHA counsel would not face disbarment for directly contact certain individuals in the course of performing their duties. This is the standard rule for Federal counsel under 2002 model rules of the American Bar Association, but not all states have adopted this yet, and the potential for disbarment can significantly interfere with investigation and enforcement activities. The second sentence would establish a firm conflict of interest rule that would bar attorneys who represent mine operators in a matter from simultaneously representing individual miners in the same matter. While the inherent conflict of interest seems clear, this practice is widespread in the industry, and greatly complicates accident investigations in particular.

(k)(5) would amend section 110 of the Act to address a technical error that was introduced to the text by the MINER Act and subsequent technical amendments. These enactments inadvertently placed new authority to issue flagrant provisions in the wrong paragraph of the Mine Act. As a result, questions have been raised about whether flagrant violations can be issued in other than failure to abate cases. MSHA has correctly interpreted the intent of the Congress in this regard (see 72 FR 13623). Nevertheless, to avoid protracted litigation on the point, this technical amendment moves the provision to the correct paragraph of the Mine Act.

This section would also clarify that the liability of directors, officers and agents for violations of the Mine Act does not change because of the form of the mine operator's business. In recent years, many mines have become limited liability corporations rather than "corporations" in the traditional sense, but the language of the Mine Act was drafted in another era and refers only to "corporate" directors, officers and agents. The amendment would ensure that such officials retain the liability they have always had under the Mine Act even should their enterprise change form, consistent with MSHA's interpretation of the Act (71 FR 38902-38905, July 10, 2006). The amendment also clarifies that violations of the requirements of the Act itself can be the basis of such liabilities, not just violations of standards, and clarifies that partners and owners are also covered.

(l) Study of Federal Licensing. - This section requires the appointment of an advisory committee to study whether the law should be amended to provide for Federal licensing of mines, mine operators, mine controllers or various mine personnel in order to ensure that those engaged in mining activities are not frequent violators of safety and health requirements. Some states have licensing provisions for certain mine specialists, for example, and revoke such licenses should the individuals involved be found responsible for violations. The bill requires that the advisory commission conduct a review of existing state requirements in this regard and their effectiveness, and provide its recommendations to Congress within 2 years.

SEC. 6. SUPPLEMENTING RESCUE, RECOVERY AND INCIDENT INVESTIGATION AUTHORITY.

The provisions of this section expand upon the work initiated by the MINER Act to improve the ability of the Nation to respond to mine emergencies. Under the MINER Act, for example, mine operators must notify MSHA within 15 minutes of the time the operator realizes that there has been a death at the mine, or an injury or entrapment that has a reasonable potential to cause death. Moreover, the MINER Act established new requirements for rescue teams at mines of different sizes.

(a) Emergency Call Center. - The bill would require that MSHA promptly establish a central communications emergency call center for mine operations, staffed and operated 24 hours per day, 7 days per week, by MSHA employees with adequate experience and training to handle emergency mine situations. A single national phone number shall be

provided for this purpose and the Secretary shall ensure that all miners and mine operators are issued laminated cards with emergency call center information.

(b) Contact Information. - The bill would require that the Emergency Call Center be provided with current contact information for all those who may need to be reached during an emergency.

(c) Mine Location Maps. - The bill would further require that MSHA's website contain the geographic coordinates of all US mines and mine impoundments, including abandoned mines.

(d) Required Notification Of Emergencies And Serious Incidents.— The bill would further require that MSHA receive notification from mine operators within an hour of serious incidents that may need to be quickly investigated to avoid miner injury or death, but are less immediate than the matters which require 15 minute notification under the MINER Act. Some of the incidents that must be reported under this requirement are specified in the bill (e.g., mine fires, roof falls, and sudden changes in mine atmospheric pressures behind seals) and the Secretary is authorized to issue regulations specifying additional types of incidents that must be so reported.

(e) Enhancing The Capabilities Of Mine Rescue Teams.— The bill would require MSHA and mine operators to take certain actions to make it easier for rescue teams to operate on mine property. These actions would implement suggestions from mine rescue team members.

First, mine rescue team members, support personnel and vehicles would received uniform credentials ensuring immediate access to mine property, to avoid delays and confusion at the entrance to such properties.

Second, mine operators would be required to have plans to ensure coordination with local emergency response personnel and to ensure that such personnel receive adequate training in how to provide assistance to mine rescue teams.

Third, mine operators would be required to facilitate the work of mine rescue teams during an emergency by storing necessary equipment in locations readily accessible to mine rescue teams, providing mine rescue teams with a parking and staging area adequate for their needs, and identifying a space appropriate for coordinating emergency communications with the mine rescue team.

Finally, mine operators would be responsible for identifying and maintaining separate spaces for family members, community members, and press to assemble during an emergency so as to facilitate communications with these groups while ensuring the efforts of the mine rescue teams are not hindered.

(f) Emergency Medical Response. - The bill would require that mine operators make arrangements for ambulances or other means of emergency medical response within 20

minutes from the site of every mine. In addition, the bill would require the Secretary to consider revising the regulations concerning the training and availability on site of medical emergency technicians and improve them as required.

(g) Accident and Incident Investigations. - This year MSHA finally released its reports analyzing the tragedies which occurred in early 2006 at the Sago, Aracoma Alma and Darby mines. The procedures used to investigate each accident were ad hoc. While MSHA some time ago began a rulemaking effort to standardize these procedures, that effort was discontinued by the current Administration. These reports, and the way they were compiled, reveal a number of problems which this bill would address.

The bill would require that a rulemaking to standardize investigation procedures be completed by October 1, 2008, and requires special outreach to certain groups which can shed light on how to approach this matter -- family members of miners who perished in the last decade, organizations representing miners, mine rescue workers, and Federal, state and local prosecutorial authorities. The regulations are to cover investigations of both accident and incident investigations -- i.e., those which actually injure or kill miners, and those which did not but might well have done so. The bill would provide the Secretary with authority to provide for alternative sets of investigative procedures based upon the type of incident, scope, or other such factors.

The procedures are also to cover so-called "internal" investigations as well as accident investigations. These internal investigations examine the conduct of agency personnel that may have contributed to a tragedy. As of the date of introduction of this bill, MSHA has not yet provided its internal investigations for the Sago, Aracoma Alma, and Darby mines.

The procedures to be established must ensure that witnesses are not coerced, avoid conflicts of interest in witness representation, and ensure confidentiality if requested by any witness. These have proven to be complex sticking points in practice, and establishing standardized procedures should facilitate further investigations. In this regard, note that subsection (k)(4) of the bill provides that no attorney representing a mine operator in a matter under this Act may concurrently represent individual miners in the same matter, a requirement that includes, but is not limited to, accident investigations.

The rules for accident and incident investigation procedures are to require that upon completion of an incident investigation, MSHA is not only to issue findings as to the actions or inactions which resulted in the incident, but is also to make recommendations as to policy, regulatory, enforcement or other changes, including statutory changes, which in the judgment of its mine safety and health experts would best prevent a recurrence of such actions or inactions at other mines. The bill further provides that the Secretary track the implementation of accident and incident investigation recommendations and provide such information annually to the Congress. MSHA does not currently do this, and it has been alleged that the failure to act upon past reports is one of the reasons why the tragedies of 2006 took place.

The rules are also to provide that the Secretary hold appropriate public hearings at the conclusion of the investigation of incidents to inform the mining community of the findings and recommendations. While it has been suggested that such hearings take place during the investigation, along the lines of the one held in connection with the Sago accident investigation, such a requirement has not been included in the bill due to the complexities of doing so while ensuring witness confidentiality. At the same time, the bill does not preclude the procedural rules from including such an approach if one can be developed.

One reason why there are request for such forums is the lack of trust many in the mining community have about the credibility of MSHA investigations. Accordingly, the bill provides that upon timely request by the authorized representative of miners at a mine, or the authorized representative of the families, MSHA is to contract with the Chemical Safety Board for an independent evaluation of the accident or incident. The agency would be required to assist the Board with such technical assistance as it requires, but may at its option continue its own investigation.

SEC. 7. RESPIRABLE DUST STANDARDS.

(a) Respirable Dusts.— The 1977 Federal Mine Safety and Health Act established the standards to be applicable to respirable coal dust by law. The law specified who was responsible for measuring compliance, the instruments to be used, and other exposure limit. The law further specified that exposure of miners to respirable coal dust was to be reduced when respirable silica dust was also present.

These requirements were a critical part of the 1977 law, and were designed to eliminate black lung disease and silicosis among the mining population. Indeed, the compensation program for miners who incur black lung disease, including the portion paid by the Federal government, was a critical part of that law. Unfortunately, we know today that these requirements did not eliminate new occurrences. More unfortunately, we know that after years of effort to amend the existing rules, and to develop new instrumentation permitting real-time accurate exposure information for coal dust, MSHA has failed to act.

Accordingly, 40 years after the Federal Mine Safety and Health Act, the bill would have the Congress once again set the appropriate standards. The permitted limit for coal dust would be cut in half, consistent with the recommendations of the National Institute for Occupational Safety and Health (NIOSH), and the permitted dose would be adjusted to reflect hours actually worked. A separate limit would be established for silica, again consistent with the recommendations of NIOSH. The bill would require that compliance sampling be done by the Federal government, not mine operators as at present, based on a long history of fraud and abuse. The bill would require the use of the NIOSH developed and certified Personal Dust Monitor (PDM) for all coal dust sampling (traditional methods will be used for silica dust sampling). These devices continuously display current exposures, and record it in a form that can be electronically downloaded each shift to the operator and MSHA. The bill would further require that all underground miners be equipped with PDMs, and be able to adjust their work to keep their exposure

below the applicable limits. While this will result in an initial expense for coal mine operators, the savings due to improved miner health should be substantial.

(b) Conforming amendment. - This amendment strikes section 205 of the Act which provided for adjusting the amount of respirable coal dust by the amount of respirable silica dust, since the bill would provide for an independent silica standard.

(c) Assessment On Program Operations Of Cumulative Impact Of External Requirements Added Since 1977.— The need to make so many amendments to MSHA standards by legislation evidences the fact that the agency has been very unsuccessful in using its rulemaking authority. The bill would require the National Academy of Sciences to conduct a study of the various statutes, executive orders, and memoranda that been issued since the Mine Act was passed in 1977 to examine the impact they have had on the rulemaking authority provided under the law, and to quantify to the extent possible the costs these requirements have imposed upon miners.